

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Gustavus Electric Company

Project No. 11659-002

NOTICE OF DETERMINATIONS AND OF
PROPOSED LICENSE TERMS AND CONDITIONS

(August 19, 2004)

1. On October 23, 2001, Gustavus Electric Company (Gustavus) filed an application for an original license, pursuant to section 4(e) of the Federal Power Act (FPA),¹ for the construction, operation, and maintenance of the 800-kilowatt (kW) Falls Creek Project No. 11659. The project would be located on lands that are currently within Glacier Bay National Park and Preserve (GBNPP), but which are proposed to be transferred to the State of Alaska (Alaska) in exchange for certain other lands currently owned by Alaska, pursuant to project-specific legislation, the Glacier Bay National Park Boundary Adjustment Act of 1998 (Boundary Act).²
2. The Boundary Act requires the Commission to make certain determinations, with the concurrence of the Secretary of the Interior (Secretary), or the Secretary and Alaska, before a license may be issued and before the land exchange may be completed. This notice makes the required determinations. We are simultaneously issuing letters to the Secretary and the Governor of Alaska, as appropriate, requesting their concurrences.
3. Finally, the Boundary Act requires any license issued for this project to include certain conditions designed to protect the GBNPP. This notice affirms that any license issued for the project will contain such terms and conditions.

¹ 16 U.S.C. § 797(e).

² Pub. L. No. 105-317 (Oct. 30, 1998).

I. Background

A. Project Description and Location

4. The proposed Falls Creek project would consist of a diversion dam, powerhouse, and connecting penstock. It would be operated as a run-of-river project, where inflow to the project matches outflow downstream of the project. The project diversion would be located at river mile 2.4 of the Kahtaheena River, which is also commonly known as Falls Creek. The powerhouse would be located at river mile .45. Falls Creek drains into Icy Passage, which is part of Glacier Bay.³

B. The Boundary Act

5. Some of the lands proposed by Gustavus to be used for the project are currently located in GBNPP. The Commission however is prohibited from issuing an original license for a project located in whole or part within a national park.⁴ In 1998, Congress enacted the Boundary Act, which, if the conditions therein are satisfied, will enable the project to be licensed.

1. The Land Exchange

6. The Boundary Act establishes conditions for a land exchange between the United States and Alaska that, if completed, will transfer title to lands on which the project would be located from GBNPP to Alaska. The lands to be conveyed to the United States from Alaska are to be determined by mutual agreement of the Secretary and Alaska.⁵ The lands to be conveyed to Alaska from the United States are also to be designated by the Secretary and Alaska consistent with sound land management principles from lands identified by the Commission, with the concurrence of the

³ The location of the proposed project and alternatives considered in the Environmental Impact Statement prepared in this proceeding is shown in Appendix A, Figures 2-1, 2-8, and 2-9, pages A-9, A-16, and A-17, respectively.

⁴ See discussion in *James River II, Inc.*, 53 FERC ¶ 61,096 at 61,263-65 (1990).

⁵ Section 2(a)(1).

Secretary and Alaska, to be the minimum amount of land necessary for the construction and operation of a hydroelectric project.⁶

7. The land exchange is intended to occur no later than six months after the issuance of a license to Gustavus.⁷ The Secretary may however extend the time periods for completion of the land exchange, if that is necessary in order for it to be completed.⁸

8. The Boundary Act also includes provisions to ensure that the land exchange maintains within the National Wilderness Preservation System approximately the same acreage as currently designated wilderness. To that end, it requires Interior, upon consummation of the land exchange, to designate certain state-owned lands as wilderness and to administer those lands according to the laws governing national wilderness areas in Alaska.⁹

9. The Boundary Act also provides that the land exchange may occur only if the Commission conducts economic and environmental analyses that conclude, with the concurrence of the Secretary, that the construction and operation of the project on the lands to be transferred to Alaska:

- will not adversely impact the purposes and values of the Preserve as constituted after the consummation of the land exchange; and
- will comply with the requirements of the National Historic Preservation Act.¹⁰

⁶ Sections 2(a)(1) and (4).

⁷ Section 2(a)(1).

⁸ Section 2(a)(4).

⁹ Section 2(b).

¹⁰ Sections 2(c)(1)(A) and (B). In addition, the land exchange may occur only if the Commission concludes that construction and operation of the project can be accomplished in an economically feasible manner. The Secretary's concurrence is not required for this conclusion. Section 2(c)(1)(C).

10. When the exchange is completed, the lands acquired by the United States from Alaska under the Boundary Act are to be added to the National Park System. Accordingly, the Secretary is also directed to adjust the boundaries of the Park System, including wilderness areas, to add those lands, and to exclude therefrom the lands transferred to Alaska.¹¹

2. The Commission's Responsibilities

11. The Boundary Act specifically authorizes the Commission to accept and consider a license application from Gustavus to construct and operate the project on specified lands currently within GBNPP, and requires it to retain jurisdiction over any project constructed on the specified lands.¹²

12. The Boundary Act also requires the Commission to determine, with the concurrence of the Secretary and Alaska, the minimum amount of lands necessary for construction and operation of the project.¹³ The National Park Service (NPS) is to be a joint lead agency for the development of any environmental documents prepared under the National Environmental Policy Act of 1969 (NEPA),¹⁴ which must consider the impacts from licensing and any land exchange necessary to authorize the Project.

13. The Commission is also prohibited from licensing or relicensing the project or amending the project license unless it determines, with the Secretary's concurrence, that the project will not adversely impact the purposes and values of GBNPP (as constituted after consummation of the land exchange).¹⁵ Any license issued must also include a condition requiring the licensee to mitigate any adverse effects of the project on the purposes and values of GBNPP identified by the Secretary following issuance of the original license.¹⁶ Any license issued must also include a condition that construction of any part of the project cannot commence until the land exchange is

¹¹ Section 4.

¹² Section 3(a)(2) and (3).

¹³ Section 3(b)(3).

¹⁴ 42 U.S.C. § 4321, *et seq.*

¹⁵ Section 3(c)(3).

¹⁶ Section 3(c)(3).

completed.¹⁷ Finally, any license issued must include a condition providing that no construction may commence until Gustavus has received Commission approval of a financing plan.¹⁸

C. The License Application

14. Gustavus' license application was accepted on December 11, 2001. Various entities have intervened, some of which oppose the application. Several intervenors have filed comments and recommendations, and public meetings have been held in Alaska. A final Environmental Impact Statement (EIS) was issued jointly by the Commission and NPS on June 30, 2004.¹⁹ In the EIS, the Commission staff provided recommendations addressing the Commission's responsibilities under the FPA and the Boundary Act and made recommendations for terms and conditions for any license that may be issued for the project.

II. DISCUSSION

15. In the following sections, we make the required findings and discuss the required draft license articles. When we receive the concurrences required from the Secretary and Alaska in order to issue a license, we will act on Gustavus' license application.

A. Findings Requiring Concurrence

1. Effect on the Preserve

16. As noted, neither issuance of a license nor the land exchange can occur unless the Commission determines, with the Secretary's concurrence, that the project will not adversely impact the purposes and values of GBNPP (as constituted after consummation of the land exchange).

17. The EIS identifies the purposes and values of GBNPP for each of 12 kinds of environmental resources, and for each it discusses the effects of construction and operation of the project under Gustavus' proposal and the action alternatives. The affected resources, GBNPP's purposes and values, references to discussion in EIS

¹⁷ Section 3(c)(4).

¹⁸ Section (c)(1).

¹⁹ 69 Fed. Reg. 41,476 (July 9, 2004).

Chapter 4, and conclusions are set forth on Table 6.1-1.²⁰ The EIS concludes that under Gustavus' proposal and both action alternatives, construction and operation of the project will not adversely impact the purposes and values of GBNPP, as constituted after the land exchange. NPS has reviewed the Commission staff's determination on this point and concurs.²¹ The Commission has reviewed the EIS and also concurs with the staff determination.

18. The EIS recommends that any license issued contain numerous environmental protection conditions. These include: measures to protect anadromous fish; erosion prevention and control; avoidance of sensitive habitat areas; restrictions on the timing of construction activity; sediment monitoring and management plan; sediment transport measures; run-of-river operation, minimum flows, and ramping rate limits; water quality monitoring; fish screening and fish passage systems; limited public access and restrictions on recreational activities; location of facilities to minimize aesthetic harm; a biotic evaluation of impacts to fisheries; environmental compliance monitoring during construction; flow monitoring; annual consultation with resource agencies; a fund for mitigation of any unforeseen impacts; fuel and hazardous substances spill plan; wetlands avoidance and mitigation plan; road management plan; land use management plan; and notification to agencies of any non-compliance incidents.²² We will include these measures in any license issued for the project.

2. Minimum Land Necessary for Project

19. Section 3(b)(3) of the Boundary Act requires the Commission, with the concurrence of the Secretary and Alaska, to determine the minimum amount of land necessary for construction and operation of the project. The EIS considers three project development alternatives with different project boundaries.

20. Under Gustavus' proposal,²³ the project facilities would be located on a stretch of river extending from a point about 0.25 mile upstream of tidewater to a point about 2.2 miles upstream of tidewater. GEC would construct and maintain a new access/service road extending 1.7 miles from the end of the existing road system, at

²⁰ EIS at pp. 6-18 to 6-22.

²¹ EIS at p. 6-17.

²² A detailed statement of these requirements, which will be included in articles for any license issued, is found at EIS pp. 6-2 to 6-5.

²³ Described at EIS pp. 2-2 to 2-12.

which point it would branch 0.5 mile north the diversion dam/intake structure and 1.4 miles south to the powerhouse. The project boundary would include about 117 acres of land surrounding the diversion and powerhouse, plus narrow corridors for the roads, penstock, and transmission line. About 75 acres would be land exchanged to Alaska from GBNPP and about 42 acres would be land that is currently state or private land.

21. Gustavus' proposal also calls for another 775 acres in the project vicinity to be exchanged to Alaska. This land would be outside the project boundary and would be managed as fish and wildlife habitat by Alaska DNR under its Northern Southeast Area Plan.²⁴ This designation precludes most development activities, but reserves the state's right to approve gravel and rock extraction to support the hydroelectric project or the needs of the community of Gustavus.

22. Under the Maximum Boundary Alternative,²⁵ the proposed project facilities would be the same as in Gustavus' proposal, but the entire 1,145 acres of land identified in section 3(b) of the Boundary Act as potentially available for the development of a hydroelectric project would be transferred to Alaska, and all of that land, plus the 42 acres of state and private land referred to above, would be included within the project boundary.

23. The Corridor Alternative would also have the same facilities as Gustavus' proposal, but fewer acres of GBNPP land would be exchanged to Alaska (680 instead of 850), and, like the Maximum Boundary Alternative, all of the exchanged land plus the 42 acres of existing state and private land would be within the project boundary.²⁶ The project boundary would extend about 0.25-mile from all project features except along the eastern boundary, where the distance would be reduced because a 0.25-mile boundary would extend beyond the lands identified in the Boundary Act as potentially available for a hydroelectric project.

24. Some parties prefer the Maximum Boundary or Corridor Alternatives because those alternatives include within the project boundary all of the land exchanged to Alaska. That would enable the Commission to impose restrictions on the use of those lands desired as by these parties, such as prohibitions on commercial development and the use of all-terrain vehicles. Alaska prefers that the project boundary be

²⁴ See EIS at p. 4-198 and Appendix A, Figure 2-1.

²⁵ Described at EIS pp. 2-12 to 2-13 and shown in EIS Appendix A, Figure 2-8.

²⁶ Described at EIS p. 2-13, and shown in EIS Appendix A, Figure 2-9.

minimized in order to allow it to manage the remaining state lands transferred from GBNPP.

25. The EIS finds that the minimum amount of land necessary for the project is a slightly modified version of Gustavus' proposal. Gustavus' proposal to include approximately 117 acres within the project boundary is based on a buffer zone with a width of approximately 30-50 feet around all project facilities. The EIS finds that this should be increased to 200 feet in order to better ensure that mitigation measures can be taken for any project-related effects, such as surface erosion, that may extend beyond a 30-50 foot buffer.²⁷

26. We agree with the staff findings and recommendation. The minimum amount of land necessary for construction and operation of the project is the minimum that will enable the Commission to issue a license that satisfies the public interest/comprehensive development standard of FPA sections 10(a)(1) and 4(e). The public interest with respect to this project is in large part a function of ensuring that it does not adversely impact the purposes and values of GBNPP as constituted after the land exchange. We do that by ensuring that the project license includes the statutorily required license articles and any other articles found to be in the public interest.²⁸ It does not require the Commission to bring under federal control lands not needed for project purposes because some parties fear that the state, rather than the licensee, may not manage those lands in a manner compatible with the purposes and values of GBNPP.

27. On the other hand, we agree with the EIS that the 30-50 foot buffer proposed by Gustavus is too narrow to encompass the area in which the project is reasonably likely to affect some resources. We therefore affirm staff's recommendation that the project boundary should extend 200 feet from all project facilities.

3. Compliance with the NHPA

28. Before it may issue a new license for the project, the Commission must comply with the consultation requirements of section 106 of the National Historic Preservation Act (NHPA) and the implementing regulations of the Advisory Council on Historic Preservation (Advisory Council).²⁹ Also, as noted, the Boundary provides

²⁷ EIS at 6-36- to 6-37.

²⁸ The need to avoid adverse impacts to the Preserve also explains the restrictions on public recreational access to project lands.

²⁹ 36 C.F.R. Part 800.

that the land exchange cannot proceed until the Commission determines, with the concurrence of the Secretary, that the project will comply with the NHPA.

29. The Commission and NPS concluded that the proposed project would have no effect on any historic or cultural properties eligible for the National Register of Historic Places. The Alaska State Historic Preservation Officer concurred with these conclusions.³⁰ We therefore find that the proposed project complies with the NHPA.

B. Required License Articles

30. The Boundary Act requires the Commission to include certain conditions designed to ensure that the project does not adversely impact GBNPP. Section 3(c)(1) requires any license issued to Gustavus to require Commission approval of a financing plan submitted by Gustavus before commencement of construction. Section 3(c)(3) requires any original license or new license for the project to require the licensee to mitigate any adverse effects on GBNPP “identified by the Secretary after the initial licensing.” Section 3(c)(4) states that any license shall require the land exchange to be completed before commencement of any construction. The Commission affirms that any license issued for the project will contain these requirements.

The Commission finds:

(A) The proposal filed by Gustavus Electric Company to construct and operate the Falls Creek Project No. 11659, modified pursuant to the recommendations in the Environmental Impact Statement issued in this proceeding on June 30, 2004, will not adversely impact the purposes and values of Glacier Bay National Park and Preserve as constituted after consummation of the land exchange provided for by section 2 of the Glacier Bay National Park Boundary Adjustment Act of 1998.

(B) The minimum amount of land necessary to construct and operate the Falls Creek Project No. 11659 is all lands within 200 feet of the outside boundary of any project facility, as discussed in section 6.1.2.4 of the Environmental Impact Statement (EIS) issued in this proceeding on June 30, 2004.

³⁰ See letter dated June 18, 2003, from Tommie Patrick Lee, Preserve Superintendent, to Judith Bittner, State Historic Preservation Officer, and July 15, 2003 concurrence, both placed into the record on August 11, 2004.

(C) The Falls Creek Project No. 11659, as proposed by Gustavus Electric Company and as modified pursuant to the recommendations in section 6.1.1 of the EIS, complies with the National Historic Preservation Act.

By direction of the Commission.

Linda Mitry,
Acting Secretary.